

88 - 1711

No.

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In the Supreme Court of the United States

October Term, 1983

ALBRECHT, INC., et al.,
Appellants,

VS.

VILLAGE OF HUDSON,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

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April 1984

QUESTIONS PRESENTED

1. Whether municipal ordinances that require owners of commercial property to secure approval of an architectural review board prior to making any alterations to their property costing in excess of fifty dollars (\$50.00) are beyond the police power of the states and, therefore, violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution when the property involved has no historical or other architecturally significant qualities and is not located in a residential, historical or other architecturally significant area, and when the members of the architectural review board have no particular architectural, real estate or other special qualifications.
2. Whether a requirement that owners of property secure approval of an architectural review board prior to making any alterations to their property costing in excess of fifty dollars (\$50.00) is beyond the police power of the states and, therefore, violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution when the municipal ordinances establishing the architectural review board contain no meaningful standards to be applied by the board and the board itself has adopted no such guidelines.

PARTIES BELOW AND CORPORATE PARTIES' AFFILIATIONS

Albrecht, Inc. is a corporation which owns a 19.4% interest in The Fred W. Albrecht Grocery Company and a 51% interest in Joemidge Enterprises, Inc. but does not have any other parent companies, subsidiaries or affiliates. Krumroy Construction Company has no parent companies, subsidiaries or affiliates.

TABLE OF CONTENTS

Questions Presented	I
Parties Below and Corporate Parties' Affiliations	II
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Ordinances Involved	2
Statement	6
The Federal Questions Are Substantial	11
Conclusion	17
Appendices:	
A. Opinion of the Supreme Court of Ohio in <i>Albrecht, Inc., et al. v. Village of Hudson</i> , 9 Ohio St. 3d 69 (January 25, 1984)	A1
B. Decision and Journal Entry of the Court of Appeals (December 1, 1982)	A16
C. Findings of the Court of Common Pleas of Summit County, Ohio (February 22, 1982)	A26
D. Judgment of the Court of Common Pleas (April 20, 1982)	A30
E. Judgment Entry of the Supreme Court of Ohio (January 25, 1984)	A33
F. Notice of Appeal to the Supreme Court of the United States (April 4, 1984)	A34
G. Codified Ordinances of the Village of Hudson:	
Chapter 1204	A35
§ 1428.01	A53

TABLE OF AUTHORITIES

Cases

<i>A.L.A. Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935)	16
<i>Beck v. Ohio</i> , 379 U.S. 89, 93 (1964)	10
<i>Berman v. Parker</i> , 348 U.S. 26, 32 (1954)	12
<i>Board of Supervisors v. Rowe</i> , 216 Va. 128, 216 S.E.2d 199, 213 (1975)	13, 15
<i>Euclid v. Ambler Realty Company</i> , 272 U.S. 365, 395 (1926)	12
<i>Hudson v. Albrecht, Inc.</i> , 9 Ohio St. 3d 69, 458 N.E.2d 852 (1984)	1
<i>Kenyon Peck v. Kennedy</i> , 210 Va. 60, 64, 168 S.E.2d 117, 120-121 (1969)	13
<i>McCautha v. California</i> , 402 U.S. 183, 272-275 (1971)	16
<i>Metromedia, Inc. v. San Diego</i> , 453 U.S. 490 (1981)	12, 14
<i>Panama Refining Co. v. Ryan</i> , 293 U.S. 388 (1935)	16
<i>Penn Central Transportation Co. v. New York City</i> , 438 U.S. 104 (1978)	12
<i>State v. Jones</i> , 305 N.C. 520, 290 S.E.2d 675 (1982)	12
<i>Welch v. Swasey</i> , 214 U.S. 91 (1909)	12

Constitution and Municipal Ordinances

<i>The Due Process Clause of the Fourteenth Amendment to the United States Constitution</i>	2, 11, 17
<i>Codified Ordinances of Hudson:</i>	
Section 1204.01	2
Section 1204.06	3, 7
Section 1204.08	5, 6

Section 1204.99	11
Section 1428.01	6, 7

Miscellaneous

ANDERSON, 1, AMERICAN LAW OF ZONING (1976)	12
DAVIS, K., ADMINISTRATIVE LAW TREATISE (1978)	16
Williams, <i>Subjectivity, Expression and Privacy: Problems of Aesthetic Regulation</i> , 62 MINN. L. REV. (1977)	15

No.

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Appellee.

**ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO**

JURISDICTIONAL STATEMENT

Appellants, Albrecht, Inc. and Krumroy Construction Company (defendants below), appeal from the judgment and opinion of the Supreme Court of Ohio entered on January 25, 1984, which held that Chapter 1204 of the Codified Ordinances of the Village of Hudson was not violative of the United States Constitution and which affirmed the finding that Appellants had violated that Chapter.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, which appears as Appendix A, *infra*, is reported as *Hudson v. Albrecht, Inc.*, 9 Ohio St. 3d 69, 458 N.E.2d 852 (1984). The opinion of the Ohio Court of Appeals for the Ninth Judicial District is not reported but appears as Appendix B, *infra*. The opinion of the Court of Common Pleas of Summit County, Ohio is not reported but appears as Appendix C, *infra*.

JURISDICTION

This is an appeal from a final judgment entered pursuant to the decision of the Supreme Court of the State of Ohio holding that particular municipal architectural style ordinances are valid. In their Amended Answer and Amended Counterclaim, and throughout the proceedings in the state courts, appellants (defendants below) drew into question the validity of those municipal architectural style ordinances on the ground of their repugnance to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Judgment was entered in accord with the Ohio Supreme Court's opinion on January 25, 1984 (the Mandate of the Ohio Supreme Court appears as Appendix E, *infra*). A Notice of Appeal was filed with the Clerk of that Court on April 4, 1984 and a copy thereof filed with the Clerk of Courts of Summit County, Ohio on April 5, 1984 (Appendix F). This Court has jurisdiction of this appeal by virtue of 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides:

[N]or shall any State deprive any person of life, liberty or property, without due process of law; . . .

The pertinent parts of the sections of the Codified Ordinances of the Village of Hudson involved are as follow:

1204.01 PURPOSES.

(a) *Generally.* The Architectural and Historic Board of Review hereinafter created shall serve to

protect and preserve the value, appearance and use of property on which buildings are constructed or altered, to maintain a high character of community development, to protect the public health, safety, convenience and welfare and to protect real estate within the Municipality from impairment or destruction of value. Such purposes shall be accomplished by the Board by regulating, according to accepted and recognized architectural principles, the design, use of materials, finished grade lines, dimensions, orientation and location of all main and accessory buildings to be created, moved, altered, remodeled or repaired, subject to the provisions of the Zoning and Building Codes and other applicable ordinances of the Municipality. In reviewing, regulating and approving building plans, the Board shall consider and take cognizance of the development of adjacent, contiguous and neighboring buildings and properties for the purpose of achieving safe, harmonious and integrated development of related properties.

When requested, the Board shall act in an advisory capacity to any officer, board or commission of the Municipality. In fulfilling any such request, the Board may require drawings, plans, specifications or studies to be submitted according to the provisions of this chapter for its evaluation and recommendation.

1204.06 DUTIES AND POWERS FOR OTHER THAN
THE HISTORIC DISTRICT AND/OR HIS-
TORIC LANDMARKS.

When the Historic District and/or historic landmarks are not involved, the Architectural and Historic

Board of Review shall have the following duties and powers.

The Building Inspector shall review all documents submitted for a building permit and the applicant shall satisfy the Inspector that the documents comply with the requirements hereinafter defined and with all other ordinances of the Municipality that have application to the issuance of building permits. The Building Inspector shall reject any application that does not conform to these requirements. If the application is acceptable to the Building Inspector, the Board shall review such application at a public meeting within twenty-one days of its receipt by the Chairman. Where field inspections or detailed reviews are necessary, an application may be tabled for up to twenty-one days; where other unusual circumstances dictate, additional time may be taken by the Board upon notice to the applicant. Within seven days subsequent to its decision, the Board shall report in writing to the Building Inspector its actions together with the reasons therefor. Such actions shall consist of an "approval," "disapproval" or "conditional approval" based on stipulated revisions. If the Board is notified by the property owner in writing within thirty days of objections to the stipulated revisions of a conditional approval, the Board shall again review the application and issue either an unqualified "approval" or "disapproval" within thirty days from the receipt of such letter by the Chairman. The Building Inspector shall then date and stamp the application as "approved" or "disapproved," advising the applicant in writing, in the latter case, of the reasons for such disapproval.

1204.08 REVIEW PROCEDURE IN ALL AREAS
OTHER THAN HISTORIC DISTRICTS
AND/OR HISTORIC LANDMARKS.

(a) No residential, commercial or industrial building permit shall be issued unless the applicant establishes for the Architectural and Historic Board of Review that:

- (1) The applicant has complied with Sections 1204.06 and 1204.10 [See Appendix G at A50] and the proposed structure is in compliance with subsection (b) hereof;
- (2) The exterior architectural character and functional plan of the proposed structure, when erected, will not be at such variance with existing structures, or structures currently being built, in the immediate neighborhood or zoning district as to cause substantial depreciation in the property values of such existing structures or structures currently being built;
- (3) The site utilization and orientation of the proposed structure is reasonably integrated with existing roads, drives, vehicular traffic patterns and pedestrian walkways abutting the property upon which the proposed structure is to be built; and
- (4) The proposed structure does not violate the "look-alike" provisions of subsection (b) hereof.

(b) No building permit shall be issued in a Residence District . . .¹

1428.01 PERMIT REQUIRED.

No person shall construct or alter any building or structure in the Municipality, except fences, when the cost of the same exceeds fifty dollars (\$50.00) or where the effect of such construction or alteration is to enlarge the capacity or affect the bearing walls of any building or the roof thereof, without having first secured a permit therefor.

The full texts of these and other Ordinances referred to in this Jurisdictional Statement are set forth in Appendix G.

STATEMENT

Appellant Albrecht, Inc. ("Albrecht") is the lessee, with an option to purchase, of a shopping center located in the Village of Hudson, Ohio. One of the establishments in that shopping center is a grocery store known as Acme Store Number 4. This proceeding arose as a result of certain improvements that Albrecht and appellant Krumroy Construction Company carried out on Acme Store Number 4.

The Village of Hudson includes an historic district in which are located a number of significant structures dating from the nineteenth century. The Village has taken steps to preserve those historically significant structures, including the creation of a body known as the

1. The property in issue in this case was not located in a Residence District so Subsection (b) of Section 1204.08 would not be applicable.

Architectural and Historic Board of Review. The authority of the Architectural and Historic Board of Review, however, is not limited to consideration of matters involving structures with historic significance or structures located within the historic district. Rather, it is given an absolute veto power over alterations to any structure in the Village when the cost of those alterations exceeds fifty dollars (\$50.00). Sections 1428.01 and 1204.06 of the Codified Ordinances of Hudson (Appendix G at A53 and A42). The shopping center in which Acme Store Number 4 is located is not in or near the historic district of Hudson nor has it been suggested at any stage of this action that it has any historic significance whatsoever.

During March of 1978, appellants applied to the Hudson Superintendent of Building Inspection (the "Building Inspector") for a Building Permit in connection with planned expansion and other construction on Acme Store Number 4.² Documents submitted to the Building Inspector in support of appellants' applications detailed expansion work to be carried out on the east, south and west sides of Acme Store Number 4. The submitted plans, however, did not indicate that appellants intended to replace windows on the north side of the store with aggregate stone panels for energy conservation and merchandising reasons.

The Building Inspector reviewed appellants' application pursuant to Section 1204.06 of the Codified Ordinances of Hudson (Appendix G at A42) and, having assured himself that the proposed construction fully com-

2. Hudson's regulation of construction of commercial buildings does not include consideration of safety or health matters such as electrical or plumbing standards. Those kinds of matters are regulated by the State of Ohio and there has been no contention in this matter that appellants failed to fully comply with the applicable Ohio regulations.

plied with the requirements of all applicable Hudson ordinances, submitted it to the Village's Architectural and Historic Board of Review. Following approval by the Architectural and Historic Board of Review, on September 13, 1978, the Building Inspector issued appellants a Building Permit.

Appellants did not take any immediate steps after receipt of their Building Permit to commence construction. On May 9, 1980, appellants requested the Building Inspector to revalidate the previously issued Building Permit. Based upon the plans that he and the Architectural and Historic Board of Review had previously examined, he did so by entering the date and his initials on the face thereof.

During late 1980 and early 1981, appellants performed the planned work on Acme Store Number 4, including the replacement of windows with aggregate stone panels. On March 4, 1981, Hudson's Building Inspector issued a stop work order on the ground that appellants had failed to obtain a building permit from the Village of Hudson for the aggregate stone panels. Subsequently, the Village of Hudson instituted this action in the Common Pleas Court of Summit County, Ohio requesting that appellants be enjoined from performing any further construction on Acme Store Number 4. The Village further requested that appellants be ordered to remove the aggregate stone panels that had been installed on the north side of the store.

Appellants defended the action against them on the ground that the Hudson ordinances did not require inclusion of the planned window replacement in the documentation submitted to the Building Inspector in support of the application for building permit. Additionally, in their

Amended Answer and Amended Counterclaim, filed in the Common Pleas Court on May 22, 1981, appellants alleged that the sections of Chapter 1204 of the Codified Ordinances of Hudson (Appendix G at A35-A53) allegedly applicable to them, were violative of the United States Constitution. Appellants' position before the Common Pleas Court was that the Hudson ordinances were unconstitutional because their purpose was solely the promotion of aesthetic values and, further, because they failed to contain meaningful standards to be applied by the Architectural and Historic Board of Review in considering applications for building permits in non-historic sections of Hudson.

The Common Pleas Court, following trial, found that information regarding the window replacement was information necessary to the determination and provision for enforcement of Hudson's Zoning Code and thus information appellants should have included in their submission to the Building Inspector (Appendix C at A26). The Court further found, and so provided in its Judgment Entry of April 20, 1982, that Chapter 1204 of the Codified Ordinances of the Village of Hudson was "valid, constitutional and applicable to the work done by Defendants on its windows and facade. . ." (Appendix D at A30).

Appellants appealed the decision of the Court of Common Pleas to the Ohio Court of Appeals for the Ninth Judicial District. Following submission of briefs and oral argument, that Court, on December 1, 1982, issued a Per Curiam Opinion which, in part, found that the trial court did not err in finding that the Hudson Ordinances were constitutional (Appendix B at A23).

Appellants thereafter appealed to the Supreme Court of Ohio. Following submission of briefs and oral argument to that Court, it issued an opinion on January 25,

1984, with one Justice dissenting, affirming the decision of the Court of Appeals (Appendix A). The majority of the Ohio Supreme Court found that Chapter 1204 of the Codified Ordinances of Hudson was a valid exercise of the State's police power and, therefore, was not violative of the United States Constitution. Specifically, the Court held:

1. There is a legitimate governmental interest in maintaining the aesthetics of the community and, as such, aesthetic considerations may be taken into account by the legislative body in enacting zoning legislation.
2. The monetary interests of protecting real estate from impairment and destruction of value are includable under the general welfare aspect of the municipal police power and may therefore justify its reasonable exercise.

(Syllabus of Opinion of Supreme Court of Ohio, Appendix A at A1.) (The syllabi of opinions of the Ohio Supreme Court are the rule of the cases. See *Beck v. Ohio*, 379 U.S. 89, 93 (1964).)

In rejecting appellants' arguments, the Ohio Supreme Court applied and enforced to the appellants' disadvantage state statutes (municipal ordinances) which appellants had, in their Amended Answer and Amended Counterclaim and at all subsequent stages, insisted were repugnant to the United States Constitution. Appellants filed a Notice of Appeal to this Court in the Ohio Supreme Court on April 4, 1984 (Appendix F).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

In this case the Ohio Supreme Court has upheld municipal ordinances that require owners of commercial property, located in non-residential areas, to obtain the approval of a board, consisting of individuals without any particular architectural qualifications, prior to making any improvements upon their property if the costs of those improvements will be in excess of fifty dollars. This requirement is imposed despite the fact that the commercial property is not located in any kind of historic or other special area and despite the fact that the property itself has no historic or other special significance. Even though failure to comply with the ordinances upheld by the Ohio Supreme Court can result in imposition of a monetary penalty, as well as an award of equitable relief (see Section 1204.99 of the Codified Ordinances of Hudson, Appendix G at A53), no meaningful guidelines have been provided by either the ordinances themselves or by the Architectural and Historic Board of Review to indicate what types of improvements will be permitted in nonhistoric, nonresidential areas. Rather, the decision of the Architectural and Historic Board of Review of whether to permit a particular proposed improvement is, in effect, committed entirely to whim, presumably based upon its members' determination of what they find aesthetically pleasing or displeasing. This type of ad hoc, aesthetic regulation of private property is violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and merits plenary consideration by this Court.

This Court long ago recognized that the validity of land use control regulations is dependent upon their furtherance of a valid purpose within a state's police power.

Euclid v. Ambler Realty Company, 272 U.S. 365, 395 (1926). It has further recognized that an exact definition of the reach of the police power is not possible, "for each case must turn on its own facts." *Berman v. Parker*, 348 U.S. 26, 32 (1954). Generally, however, the police power provides a state with authority to adopt regulations that have a substantial relationship to the public health, safety or general welfare under the circumstances before the legislative authority.

This Court early held that the fact that a particular land use regulation promoted the aesthetic values of the regulator did not, in itself, lead to a finding that the regulation was a violation of Due Process, if, in addition, it promoted some health or safety purpose. *Welch v. Swasey*, 214 U.S. 91 (1909). It was the widely held view of the courts of the various states, however, that the promotion of aesthetic values was not, in itself, a valid purpose of the police power. 1 ANDERSON, AMERICAN LAW OF ZONING, §7.22 (1976).

This Court has now recognized that, under certain circumstances, the relationship between aesthetics and the public welfare is such that the promotion of aesthetic values is a valid police power purpose. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Further, in recent years, more and more state courts have held that land use controls are not automatically invalid simply because their sole purpose for existing is to promote aesthetic values. For example, in *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982), the Supreme Court of North Carolina, after surveying the extensive shift between 1971 and 1982 in other states from the view that promotion of aesthetics was not a valid police purpose to the view that it was, joined that shift in upholding

regulation of junkyards. *But see Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199, 213 (1975) ("[A] 'county cannot limit or restrict the use which a person may make of his property under the guise of its police power where the exercise of such power would be justified solely on aesthetic considerations.'") (quoting *Kenyon Peck v. Kennedy*, 210 Va. 60, 64, 168 S.E.2d 117, 120-21 (1969)).

The present case represents Ohio's shift to the view that a state's police power includes the power to regulate land use based upon aesthetics. This case is different in two important respects, however, from the cases in most other jurisdictions in which regulation based upon aesthetics has been upheld. First, this case is different because of the type of property and land use submitted to regulation. Second, this case is different because of the method of aesthetic regulation used.

1. This case, unlike the vast majority of aesthetic regulation cases, does not involve either a type of land use generally viewed as aesthetically displeasing or a property of some particular significance. This case, therefore, is far different from the numerous reported cases involving billboards or junkyards, land uses that are generally recognized as aesthetically displeasing, at least in most locations. And, this case is also different from cases involving historic landmarks or historic districts. In this case, the Village of Hudson has attempted to move the practice of regulating land use based upon aesthetics into a totally new realm. Although regulation based upon aesthetics is within the police power when the purpose of the regulation is to prohibit land use that is patently offensive either because of the use involved (i.e., junkyards) or because of the location (i.e., historic districts), regulation based upon aesthetics is much less clearly within the police

power when it is not being used to prohibit a use that is patently offensive, but rather to promote what a small group of people considers aesthetically pleasing.

In *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), Justice Brennan, in his concurring opinion, stated that some communities have an obviously greater interest in pursuing aesthetic regulations than do others. Specifically, he pointed to Williamsburg, Virginia as an example of a community with such an interest in aesthetics and historical authenticity to legitimate aesthetic regulations even if those regulations impact upon First Amendment values. This differing degree of interests not only should be seen as present for First Amendment analysis, but also when the sole question is whether a particular type of aesthetic regulation is within the police power. Clearly, Hudson's interest in aesthetics is more legitimate in the historic section of the Village than in the nonhistoric section. Likewise, it would be more legitimate in the residential nonhistoric section than in the commercial nonhistoric section. It is appellants' position that Hudson clearly does not have a significant enough aesthetic interest in the nonhistoric commercial section to permit it, pursuant to its police power, to review every building alteration that costs in excess of fifty dollars (\$50.00).

Appellants further submit that the legislative statement relied upon by the Ohio Supreme Court for its conclusion that the ordinances creating the Architectural and Historic Board of Review further the purpose of protecting real estate "from impairment and destruction of value . . ." does not serve to move the ordinances at issue out of the realm of aesthetic regulation. The members of the Architectural and Historic Board of Review have no special qualifications regarding real estate valuation generally, not to mention the type of commer-

cial real estate involved in this case. Clearly, the course that will be followed by the Board in considering whether a particular proposed improvement will increase or decrease the value of surrounding properties is whether the Board considers it aesthetically pleasing or displeasing. *See Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).

Even if the Board members were real estate experts the problem would remain. It has been suggested that only advanced techniques of statistical analysis such as multiple regressions could truly indicate whether a particular architectural feature of a neighboring structure has an adverse effect on property value. Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1, 20 (1977). In the absence of such analysis, to suggest that the Board is to consider surrounding property values is to suggest nothing more than that the Board is to determine whether they perceive the planned change to be aesthetically pleasing.

2. The method of aesthetic regulation involved in this case is also far different from that present in the vast majority of cases in which aesthetic regulation has been upheld. The regulation in this case is an ad hoc type regulation. Neither the legislative body that created the Architectural and Historic Board of Review nor the Board itself has adopted any meaningful guidelines to indicate to property owners in appellants' position what will be considered in determining whether a particular "alteration" will be approved or disapproved. Rather, the only guidance available to the property owner is the guidance that comes from preparing detailed plans and submitting them to the Board to see if they appeal to the Board's taste on that given day. As stated by Justice C. Brown, in dissenting from the Ohio Supreme Court's opinion:

The opinion of the court has set the stage in Ohio for local governments to enact any restriction on private land usage they desire. This court has made it perfectly clear that it does not require those restrictions to meet the rational relationship test. The court does not even require such restrictions to meet constitutional standards of review for vagueness. Under such a system bribery will become the only way landowners of the future will be able to effect any reasonable and proper change with regard to the use of their properties.

(Appendix A at A15).

The total lack of guidelines for the exercise of the Board's discretion is itself a violation of the Due Process Clause. Traditionally, the type of problem presented in this case has been analyzed in terms of whether there has been a delegation of legislative authority. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). More recently, however, there has been a growing recognition that the true Due Process requirement is that the public be protected from arbitrary action. *K. Davis, ADMINISTRATIVE LAW TREATISE*, §3:15 (1978). See, *McCautha v. California*, 402 U.S. 183, 272-275 (1971) (Brennan, J. dissenting). The goal of protecting from arbitrary actions may be served in either of two ways. The legislative enactment providing an entity such as the Architectural and Historic Board of Review with authority can include guidelines for the exercise of that authority. In the absence of such guidelines in the legislative enactment, the decision-making body itself can adopt guidelines for the exercise of its authority. In this case neither type guideline is present. This not only makes it impossible for individuals in appellants' position to anticipate

what kinds of alterations will be approved or not approved, it forecloses meaningful judicial review of the Board's decisions. This presents a significant question under the Due Process Clause of the Fourteenth Amendment.

Appellants submit that the federal questions presented by Hudson's regulation are substantial. This Court should receive briefs on the merits and hold oral argument in order to provide guidance to the states regarding the proper role of aesthetic regulation pursuant to the police power.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Ohio (Decided January 25, 1984)

No. 83-142

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

VILLAGE OF HUDSON,
Appellee,

vs.

ALBRECHT, INC. et al.,
Appellant.

[9 Ohio St. 3d 69]

Zoning—aesthetics: ordinance resting partly on aesthetic considerations is valid, when; general welfare aspect of municipal police power includes protecting the monetary value of real estate.

1. There is a legitimate governmental interest in maintaining the aesthetics of the community and, as such, aesthetic considerations may be taken into account by the legislative body in enacting zoning legislation.
2. The monetary interests of protecting real estate from impairment and destruction of value are includable under the general welfare aspect of the municipal police power and may therefore justify its reasonable exercise.

APPEAL from the Court of Appeals for Summit County.

Appellant Albrecht, Inc. ("Albrecht"), is the lessee with option to purchase of a shopping center known as Hudson Plaza. The center is located within the village of Hudson, appellee herein.

In March 1978, Albrecht submitted building plans to the village relating to the proposed expansion of Acme Store Number 4, a property located within the shopping center. The plans detailed work to be performed on the south, west and east sides of the building but did not indicate any alterations to the north side, which is that side which fronts the public street. Appellant Krumroy Construction Company was hired by Albrecht to complete the work.

The plans were reviewed and approved by James R. Cox, Superintendent of Service and Superintendent of Building Inspection for the village. They were then approved by the village's Architectural and Historic Board of Review ("board"), and a certificate of occupancy and a building permit were issued. No additional or modified plans concerning the store were submitted to the village although, at appellants' request, Cox reapproved the original plans in May 1980, prior to the commencement of construction.

Thereafter, on the morning of March 4, 1981, Cox observed alterations being done to the north side of Acme Store Number 4. Workmen were removing a long row of large plate glass windows from the building and replacing them with solid stone aggregate panels. Due to the fact that this alteration had not been included in the approved plans, Cox issued a verbal stop work order and later that day issued a written stop work order. Both orders were ignored by appellants and the replacement panels were completely in place on the following day.

On May 15, 1981, the village filed an amended complaint in the court of common pleas seeking, *inter alia*, to enjoin appellants from performing any [70] further work on the store or from occupying or using it until a permit for the disputed work was obtained. Appellee further sought an order commanding appellants to remove the new panels from the building.

Appellants filed an amended counterclaim asserting, among other things, that portions of appellee's zoning ordinances were unconstitutional.

The trial court upheld the validity of the village ordinances and ordered appellants to submit their plans for the disputed alterations in accordance with the ordinances. The counterclaim was dismissed and final judgment was entered for the village. Upon appeal, the court of appeals affirmed.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Mr. Charles E. Merchant and Ms. K. J. Montgomery, for appellee.

Messrs. Brouse & McDowell, Mr. Joseph M. Holden and Mr. John W. Solomon, for appellants.

J.P. CELEBREZZE, J. The planning and zoning code for the village of Hudson is contained in Part Twelve of the village's Codified Ordinances. The specific portion of Part Twelve which concerns the instant appeal is Chapter 1204.

Section 1204.03 of that chapter creates an Architectural and Historic Board of Review. The function of that body is set forth in Section 1204.01:

"(a) Generally. The Architectural and Historic Board of Review hereinafter created shall serve to protect and preserve the value, appearance and use of property

on which buildings are constructed or altered, to maintain a high character of community development, to protect the public health, safety, convenience and welfare and to protect real estate within the Municipality from impairment or destruction of value. Such purposes shall be accomplished by the Board by regulating, according to accepted and recognized architectural principles, the design, use of materials, finished grade lines, dimensions, orientation and location of all main and accessory buildings to be created, moved, altered, remodeled or repaired, subject to the provisions of Zoning and Building Codes and other applicable ordinances of the Municipality. In reviewing, regulating and approving building plans, the Board shall consider and take cognizance of the development of adjacent, contiguous and neighboring buildings and properties for the purpose of achieving safe, harmonious and integrated development of related properties." (Emphasis added.)

In advancement of this section, the board has authority under Section 1204.06 to review all applications for building permits following their approval by the building inspector. Section 1204.08 provides that no building permit shall be issued unless the applicant submits drawings and specifications and establishes the following:

"* * * [a](2) The exterior architectural character and functional plan of the proposed structure, when erected, will not be at such variance with existing structures, or structures currently being built, in the immediate [71] neighborhood or zoning district as to cause substantial depreciation in the property values of such existing structures or structures currently being built;

"(3) The site utilization and orientation of the proposed structure is reasonably integrated with existing

roads, drives, vehicular traffic patterns and pedestrian walkways abutting the property upon which the proposed structure is to be built; and

“(4) The proposed structure does not violate the ‘look-alike’ provisions of subsection (b) hereof.

“(b) No building permit shall be issued in a Residence District for an application to erect, construct, alter or remodel any building or structure which shall be like or substantially like any neighboring structure, hereinbefore defined, then in existence or for which a building permit has been issued. The Board shall approve such application unless the applicant fails to establish that no more than two of the following exist with respect to any such neighboring structure:

“(1) The roof style of the proposed structure is similar to the structure it resembles;

“(2) The roof pitch of the proposed structure is less than three vertical units in twelve from the structure it resembles;

“(3) More than half of the exterior surface materials of the proposed structure are the same as the structure it resembles;

“(4) The relative location of an attached garage, porch, portico, breezeway, gable or other major design feature attached to the proposed structure is similar to the structure it resembles; or

“(5) The relative location of entry doors, windows, shutters or chimneys in the proposed construction is similar to the structure it resembles.”

In this appeal, appellants assert that the Hudson regulations are unconstitutional as they are concerned solely with aesthetics.

We begin our discussion of this issue by noting that a strong presumption exists in favor of the validity of the ordinance. *Downing v. Cook* (1982), 69 Ohio St. 2d 149, 151 [23 O.O. 3d 186]; *Brown v. Cleveland* (1981), 66 Ohio St. 2d 93, 95 [20 O.O. 3d 88]. It is firmly established that the party challenging a legislative enactment bears the burden of demonstrating its unconstitutionality. *Mayfield-Dorsch, Inc. v. South Euclid* (1981), 68 Ohio St. 2d 156, 157 [22 O.O. 3d 388]; *Hilton v. Toledo* (1980), 62 Ohio St. 2d 394, 396 [16 O.O. 3d 430]. As long as the validity of the legislation is "fairly debatable," the legislative judgment in enacting it is permitted to control. *Brown v. Cleveland*, *supra*, at 98; *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560 [26 O.O. 2d 249]; *Curtiss v. Cleveland* (1959), 170 Ohio St. 127 [10 O.O. 2d 85], paragraph three of the syllabus. See, generally, *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365. The basis for this presumption is that the local legislative body is familiar with local conditions and is therefore better able than the courts to determine the character and degree of regulation required. [72] *Wilson v. Cincinnati* (1976), 46 Ohio St. 2d 138, 142 [75 O.O. 2d 190]; *Allion v. Toledo* (1919), 99 Ohio St. 416, paragraph one of the syllabus.

We further note that the right of the individual to use and enjoy his private property is not unbridled but is subject to the legitimate exercise of the local police power. See Section 3, Article XVIII of the Ohio Constitution. This power includes the authority to impose zoning regulations, although such regulations must conform to certain standards. Since the object of the police power is the public health, safety and general welfare, its exercise in order to be valid must bear a substantial relationship to that object and must not be unreasonable or arbitrary. *Cincinnati v. Correll* (1943), 141 Ohio St. 535 [26 O.O. 116], paragraph one of the syllabus.

Some Ohio cases pertaining to the issue of aesthetics have stated that such consideration alone does not justify the exercise of the police power. *State, ex rel. Killeen Realty Co., v. East Cleveland* (1959), 169 Ohio St. 375, 383 [8 O.O. 2d 409]; *Wondrak v. Kelley* (1935), 129 Ohio St. 268 [2 O.O. 159], paragraph three of the syllabus; *Youngstown v. Kahn Bros. Building Co.* (1925), 112 Ohio St. 654, 661; *Pritz v. Messer* (1925), 112 Ohio St. 628, 638. These decisions rest upon the idea that aesthetic tastes vary greatly among different people and are therefore too impractical and inconsistent a basis to be used in restricting property. *State, ex rel. Killeen Realty Co., v. East Cleveland*, *supra*, at 383; *Youngstown v. Kahn Bros. Building Co.*, *supra*, at 661. The cases also reflect the thought that aesthetics is not a concern of the public health, safety or general welfare, but is, at most, an incidental or secondary reason for enacting legislation.

It is noteworthy, however, that the nature of the police power is elastic, as it must be able to expand or contract in response to changing conditions and needs. See *Euclid v. Ambler Realty Co.*, *supra*, at 387; *Cincinnati v. Correll*, *supra*, at 540. As such, more recent Ohio cases dealing with both zoning and nuisance issues have implied that there is a governmental interest in maintaining the aesthetics of the community and have recognized its role in the exercise of police power.

One example is the case of *Ghaster Properties, Inc. v. Preston* (1964), 176 Ohio St. 425 [20 O.O. 2d 51], which upheld a statute prohibiting the erection or maintenance of advertising devices adjacent to the interstate highways. Writing for a unanimous court, Chief Justice Taft held in that case that the "general welfare" aspect of the police power is broad in nature and may include considerations which are essentially aesthetic:

"In considering whether a proposed statute prohibiting billboards adjacent to a highway bears a real and substantial relation to the public welfare, the General Assembly *may properly give weight not only to its effect in promoting public safety but also to its effect in promoting the comfort, convenience and peace of mind of those who use the highway by removing annoying intrusions upon that use.*" (Emphasis added.) *Id.* at paragraph six of the syllabus.

Later, in *State v. Buckley* (1968), 16 Ohio St. 2d 128, 133 [45 O.O. 2d 469], this court set forth an exception to the rule that a legislative enactment could [73] not be based exclusively on aesthetic considerations. That case upheld a statute requiring junkyards outside a municipality to be obscured from the ordinary view of persons passing upon state, county and township roads. The majority opinion reasoned that unfenced or inadequately fenced junkyards are patently offensive, rather than objectionable merely as a matter of taste. *Id.* at 132.

In *Buckley*, this court specifically declined to give blanket approval to all regulations based solely upon aesthetics. *Id.* at 133. Nonetheless, the evolving trend had been to grant aesthetic considerations a more significant role.¹ We believe that this is the correct approach as the appearance of a community relates closely to its citizens' happiness, comfort and general well-being. Accordingly, it is our finding that there is a legitimate governmental interest in maintaining the aesthetics of the community and that, as such, aesthetic considerations

1. This trend has also been evidenced in several appellate court decisions. See, e.g., *Pepper Pike v. Landskroner* (1977), 53 Ohio App. 2d 63, 72-73 [7 O.O. 3d 44]; *Euclid v. Fitzthum* (1976), 48 Ohio App. 2d 297, 300 [2 O.O. 3d 278]; *P&S Investment Co. v. Brown* (1974), 40 Ohio App. 2d 535, 542-543 [69 O.O. 2d 460]; *Reid v. Bd. of Review* (1963), 119 Ohio App. 67, 72 [44 O.O. 27].

may be taken into account by the legislative body in enacting zoning legislation.

In the matter at hand, it is clear from the evidence presented, as well as the language of Section 1204.01, that aesthetics was of concern to the village council in enacting the zoning ordinance. In light of our discussion above, however, we find that this does not alter the validity of the ordinance.

Moreover, we further find that the ordinance does not rest solely upon aesthetic considerations. Rather, Section 1204.01 also reflects a concern for the monetary interests of protecting real estate from impairment and destruction of value. We believe that these goals are includable under the general welfare aspect of the municipal police power and may therefore justify its reasonable exercise.

Based upon the foregoing analysis, we must reject appellants' contention that the village zoning ordinance is not substantially related to the public health, safety and general welfare and is thus an invalid exercise of the local police power.

Appellants also propose that the Hudson ordinance is unconstitutional in that it fails to set forth sufficient standards to guide the board in reviewing applications for building permits.

It is the function of the legislative body to determine policy and to fix the legal principles which are to govern in given cases. See *L. & M. Investment Co. v. Cutler* (1932), 125 Ohio St. 12, 22. However, it is not possible for the legislature to design a rule to fit every potential circumstance. As such, legislation may be general in nature, and discretion may be given to an administrative body to make subordinate rules, as well as to ascertain

the facts to which the legislative policy applies. *Id.* at 21; *Belden v. Union Central Life Ins. Co.* (1944), 143 Ohio St. 329, paragraph three of the syllabus. In order to [74] be valid, however, the legislative enactment must set forth sufficient criteria to guide the administrative body in the exercise of its discretion. *State, ex rel. Selected Properties, Inc. v. Gottfried* (1955), 163 Ohio St. 469 [56 O.O. 397].

In the present case, Section 1204.01 of the ordinance declares the broad policies to be advanced—the protection and preservation of the value, appearance and use of property; the maintenance of a high character of community development; and the protection of real estate from impairment or destruction of value. In order to accomplish this policy, the board is given authority to regulate various aspects of all structures to be built or modified. In exercising its authority, the board is to be guided by "accepted and recognized architectural principles," as well as other provisions of the zoning code and ordinances of the village. In particular, Section 1204.08 of the code lists other standards to be followed which take into account the proposed structure's harmonious development with existing buildings, as well as its reasonable integration with vehicular and pedestrian traffic patterns.

It is our view that these sections set forth all the standards reasonably necessary to guide the board in the exercise of its discretion and that, therefore, the ordinance does not constitute an unlawful delegation of legislative authority.

For the reasons herein stated, the judgment of the court of appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C. J., W. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

C. BROWN, J., dissents.

CLIFFORD F. BROWN, J., dissenting. The decision of the court in this case effectively eliminates the need for local governmental bodies to enact zoning regulations which bear a rational relationship to legitimate police powers, under Section 3 Article XVIII of the Ohio Constitution. While the court cites *Cincinnati v. Correll* (1943), 141 Ohio St. 535 [26 O.O. 116], it then discounts paragraph one of the syllabus which requires a "substantial relationship" between the objective of a statute and the public health, safety and general welfare.

Zoning ordinances which look to aesthetics for their basis have also caused difficulties in jurisdictions other than Ohio. To overcome the ancient philosophical debate over the basis for aesthetic judgments, one expert in this area, Professor Michelman, has suggested legal systems look to the impact that various land uses have on neighboring property values.² This tie to property [75] values seems to be accepted by the court in its opinion as a rational relation to the enunciated police powers found in the Ohio constitution. However, Michelman goes on to explain that only when an activity causes a decline of property values of neighboring parcels is there evidence that the activity is "• • • by a social consensus deemed intrinsically ugly, negatively suggestive, or destructive of prior existing beauty."³

In the present case the actions of appellants in no way impacted on the surrounding property values. Acme Store Number 4 is located in a shopping center. The

2. Michelman, toward a Practical Standard for Aesthetic Regulation (Feb. 1989), 15 Prac. Law. No. 2, 36.

3. *Id.* at 36, 37.

changing of glass panels to aggregate panels does not affect the surrounding neighborhood.⁴ Under the test enunciated by Michelman such action is not deemed to intrude on the aesthetics of the area.

One of the most commonly articulated reasons courts have given for being reluctant to sanction purely aesthetic regulations, even when those regulations are superficially tied to interests such as property value, is that aesthetics is a question of personal taste. What is aesthetically pleasing to one individual is an affront to the senses of another. This does not mean one individual is right and the other is wrong; rather, it merely means their tastes differ and governmental bodies should be very cautious about imposing the personal taste of one individual on another. Zoning as endorsed by *Village of Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, was never meant to be a vehicle to enforce the personal taste of one on another. The purpose was to allow for the controlled and orderly growth of cities. There are many legitimate interests which should be protected by zoning. Aesthetics alone is not one of these.

The village of Hudson concedes, and this court agrees, that aesthetic considerations alone will not justify zoning restrictions. *State v. Buckley* (1968), 16 Ohio St. 2d 123, 132-133 [45 O.O. 2d 469]; *Youngstown v. Kahn Bros. Building Co.* (1925), 112 Ohio St. 654. However, this court improperly accepts the contention of the village that the zoning ordinance does not rest solely upon aesthetic considerations because Section 1204.01 "also reflects a concern for the monetary interests of protecting real estate from impairment and destruction of value." This quoted portion of the court's opinion is predicated upon

4. See dissent in *Consolidated Management, Inc. v. Cleveland* (1983), 6 Ohio St. 3d 238, 243.

the following vague, unstable zoning ordinance language, namely:

"1204.01 purposes.

"(a) *Generally.* The Architectural and Historic Board of Review [76] hereinafter created shall serve * * * to protect real estate within a Municipality from impairment or destruction of value. * * *

This is just a goal. Nowhere in the record in this case is there any evidence that the prohibited act of the defendant, namely, replacing a long row of plate glass windows from a store building with solid stone aggregate panels, causes an "impairment or destruction" of value of real estate within the municipality.

The ordinance provision utilized to prohibit the stone panels is based upon aesthetic considerations alone and is unconstitutional. The statutes in *Ghaster Properties, Inc. v. Preston* (1964), 176 Ohio St. 425 [27 O.O. 2d 388], cited by this court in its opinion, did not rest upon aesthetics alone but validly prohibited large billboards along interstate highways in order to promote public safety as well.

This zoning case has now placed us in the era of Orwell's "1984" where Big Brother tells us what to do and think in a realm that is protected by the constitutional right of privacy under the First Amendment to the United States Constitution. *Roe v. Wade* (1973), 410 U.S. 113, 152; *Stanley v. Georgia* (1969), 394 U.S. 557; *Griswold v. Connecticut* (1965), 381 U.S. 479; see Williams, Subjectivity, Expression and Privacy: Problems of Aesthetic Regulation (1977), 62 Minn. L. Rev.; Note, Architecture, Aesthetic Zoning, and the First Amendment (1975), 28 Stan. L. Rev. 179, 184.

If a zoning code regulation or restriction devoted solely to aesthetic considerations, as in this case, can be

bootstrapped to the status of lawfulness by merely adding a provision somewhere in the zoning code that the purpose of the zoning regulation is to protect real estate "from impairment or destruction of value," then any zoning code provision, no matter how absurd, unreasonable or confiscatory can be given the aura of lawfulness.

One constraint on zoning regulations which the majority summarily dismisses is that such regulations must not be arbitrary or vague. *Cincinnati v. Correll, supra*, at paragraph one of the syllabus, requires that zoning regulations, "• • • must not be arbitrary, discriminatory, capricious or unreasonable • • •."

A New Jersey court when faced with an ordinance similar to the one involved in this case invalidated that portion of the ordinance concerned with architectural standards. The court in *Morristown Assoc. v. Mayor of Bernardsville* (1978), 163 N.J. Super. 58, 394 A. 2d 157, reasoned that:

"• • • The basic criterion for design review under the ordinance is *harmony* with existing structures and terrain. The standard does not adequately circumscribe the process of administrative decision nor does it provide an understandable criterion for judicial review. It vests the design review committee, as well as the planning board, with too broad a discretion, and permits determinations based upon whim, caprice or subjective considerations. Harmony of design and appearance is conceptual. A proposal which is considered harmonious and appropriate by one person may be deemed displeasing by another. A standard which permits such evaluations does not meet the [77] test of certainty and definiteness required of zoning regulations. • • • This deficiency likewise precludes the measurement of the reasonableness of a design approval or disapproval, thereby preventing a reviewing court from effectively determining when a

decision has been arbitrary or capricious. The portions of the subject ordinance which dictates [sic] standards for architectural design must therefore be invalidated as impermissibly vague and indefinite." *Id.* at 67-68.

A close examination of the village of Hudson ordinance which sets forth the standards of review, Section 1204.01 (a), reveals that it is based on vague standards which are beyond any real definition or interpretation.⁵ The allowance of such standards of review vests in the board of review absolute power to impose its will on the private property interests of citizens of the village of Hudson, without any meaningful criterion of review existing for the courts which may be called on to examine the board's findings. Such power is beyond the Constitution of the state of Ohio, as well as the United States Constitution.

The opinion of the court has set the stage in Ohio for local governments to enact any restriction on private land usage they desire. This court has made it perfectly clear that it does not require those restrictions to meet the rational relationship test. The court does not even require such restrictions to meet constitutional standards of review for vagueness. Under such a system, bribery will become the only way landowners of the future will be able to effect any reasonable and proper change with regard to the use of their properties.

It is for these reasons that I dissent from the majority and would reverse the decision of the court of appeals.

5. Section 1204.01(a) of the village of Hudson Zoning ordinance reads in pertinent part:

*** In reviewing, regulating and approving building plans, the Board shall consider and take cognizance of the development of adjacent, contiguous and neighboring buildings and properties for the purpose of achieving safe, harmonious and integrated development of related properties."

APPENDIX B

Decision and Journal Entry of the Court of Appeals (Dated December 1, 1982)

C.A. No. 10684

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) ss:
COUNTY OF SUMMIT)

VILLAGE OF HUDSON,
Plaintiff-Appellee,

v.

ALBRECHT, INC. and KRUMROY
CONSTRUCTION CO.,
Defendants-Appellants.

Appeal From Judgment Entered in the Common
Pleas Court County of Summit, Ohio
Case No. CV 81 3 0687

DECISION AND JOURNAL ENTRY

This cause was heard October 26, 1982, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

PER CURIAM

The Village of Hudson, Summit County, Ohio, filed a complaint against Albrecht, Inc. and Krumroy Construction Company of Akron, Ohio to restrain the defendants from occupying or using the building known as Acme Store number 4 in [2] Hudson Plaza, Hudson, Ohio until a necessary building permit and certificate of occupancy is obtained from the Village of Hudson. A request is also made that certain solid materials erected on the front of the building be removed and replaced with the previously existing material, to-wit: glass windows.

Krumroy Construction Company is the general contractor making some changes in the building occupied by Acme Store number 4 on premises at Hudson Plaza in the Village of Hudson.

Hudson does not have a commercial building code; it has such a code for one and two storey houses only. Hudson does have a zoning code and an Architectural and Historic Board of Review. The zoning inspector is also called building inspector.

In September, 1978, plans were submitted to Hudson requesting a permit to make some expansion in Acme Store number 4. The plans were approved but no action was then taken. In May, 1980, the previously approved plans were brought back to the proper office of Hudson and reapproved May 9, 1980.

There being no commercial building code adopted by Hudson the plans for work to be done on Acme Store number 4 were submitted to and approved by the State of Ohio Building Department. Those plans permitted a replacement of certain facade [3] windows from plate glass to stone aggregate. This change was not on the plans as approved by Hudson nor were such changes brought to the attention of Hudson.

In May, 1981, the zoning inspector when passing through the area of Hudson Plaza noticed that the facade panels in which the plate glass windows were located were being replaced with equal size stone aggregate panels. He issued an oral order to the workmen to cease such work. Later the inspector delivered a written cease work order. The need to keep the work progressing without putting many employees out of work resulted in completion of the facade work.

The within action was then filed to restrain Albrecht, Inc. and Acme Store number 4 from occupying or using the building. The action also asked that the court order the aggregate stone panels removed and glass windows replaced.

It is the claim of Hudson that, before such changes as are being made at Acme Store number 4 can be started an approval or permit from the Hudson Architectural and Historic Board of Review must first be obtained. The zoning inspector said for changes costing more than \$50.00 a request for a permit must be filed. If he approves it for zoning purposes (there is no claim of that herein) the inspector files the [4] request in a special compartment for action by the Architectural and Historic Board of Review.

No plans for the changes of panels from glass to stone aggregate were ever submitted to the zoning inspector and hence no such plans were ever submitted to the Architectural and Historic Board of Review.

The trial court found that the ordinance of Hudson establishing the Architectural and Historic Board of Review is valid, constitutional and applicable to the work done by Albrecht, Inc. and Krumroy Construction Company on the windows and facade of Acme Store number

4. The court said that Hudson has jurisdiction over the issuance of building permits for commercial construction.

The defendants were ordered to submit the window plans for Acme Store number 4 in accordance with submission requirements of the Village ordinance. The court said it was not necessary to remove the structures at this time.

From the judgment so entered, the defendants lodged an appeal in this court saying:

- "I. The trial court erred prejudicially in finding that the installation of stone aggregate panels by defendants had to be approved by the Architectural and Historic Board of Review of Hudson.
- [5] "II. The trial court erred prejudicially in failing to find that if the plans to replace glass panes with aggregate stone panels had been submitted to the Architectural and Historic Board of Review, that body could not legally have withheld its approval.
- "III. The trial court erred prejudicially in finding that the Hudson ordinances relating to the Architectural and Historic Board of Review are constitutional, because such ordinances place undue emphasis on aesthetics and lack standards to guide administrative action."

We shall discuss the assignments of error together. The problem in this case is must a permit be obtained and approval be made by the Architectural and Historic Board of Review before change in the facade of a building can be made in the Village of Hudson where such work costs more than \$50? Architectural and Historic Board

of Review is called Architectural Board of Review or Board of Review herein.

Hudson Ord. Section 1428.01 says:

"No person shall construct or alter any building or structure in the Municipality, except fences, when the cost of the same exceeds fifty dollars (\$50.00) or where the effect of such construction or alteration is to enlarge the capacity or affect the bearing walls of any building or the roof thereof, without having first secured a permit therefor."

Section 1222.03 [Zoning Code]:

[6] "No building or structure shall be erected, added to or structurally altered until a permit therefor has been issued by the Superintendent of Building Inspection. * * *."

Section 1204.01 says:

Generally. The Architectural and Historic Board of Review hereinafter created shall serve to protect and preserve the value, appearance and use of property on which buildings are constructed or altered, to maintain a high character of community development, to protect the public health, safety, convenience and welfare and to protect real estate within the Municipality from impairment or destruction of value. Such purposes shall be accomplished by the Board by regulating, according to accepted and recognized architectural principles, the design, use of materials, finished grade lines, dimensions, orientation and location of all main and accessory buildings to be created, moved, altered, remodeled or repaired, subject to the provisions of the Zoning and Building Codes and other applicable ordinances of the Municipality. In

reviewing, regulating and approving building plans, the Board shall consider and take cognizance of the development of adjacent, contiguous and neighboring buildings and properties, for the purpose of achieving safe, harmonious and integrated development of related properties."

"* * *"

Acme Store number 4 is not within the Historic District as fixed by the ordinances. Hudson Ord. Section 1204.06 sets out the duties and powers of the Architectural Board of Review for other than the Historic District. Those duties require that the building inspector shall review all documents submitted for a building permit. If the building inspector [7] finds the document complies with the requirements and ordinances, then the Board of Review will review the application at a public meeting.

As used in the Architectural and Historic Board of Review Hudson Ord. Section 1204.02, Definitions, sub-section (a) says:

"'Alteration' means any appreciable change in the external architectural features of any structure or building, visible from a public way or from adjoining property."

There was some evidence that adjoining houses were perhaps 600 feet or more west of Acme Store number 4. The public roadway is 500 feet away from the store. Pictures in evidence also show the stone aggregate panels and the store building to be set back under a covered walk which extends the entire front of the store building.

What we have in this case is a Village of recognized historical interest and importance to its inhabitants as well as the citizens of this area. We agree whole heart-

edly with this excerpt from *Berman v. Parker* (1954), 348 U.S. 25 at 33:

"* * *.

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. * * * The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as [8] well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. * * *."

We believe it is with this object in view that Hudson enacted the legislation that is now being considered in this instant case. The entire tenor of the zoning law, the inspection procedure and the ordinance establishing the Architectural and Historic Board of Review was to the effort to preserve Hudson and its meaning to those who live there in future years. The aim of its citizens is to have clarity, integrity and purpose. To achieve these virtues a planning and zoning code with inspection, and an Architectural and Historic Board of Review also with inspection were enacted.

These ordinances are all in part 12 of the Codified Ordinances of Hudson and thus make a complete whole for the protection of virtues which belong to its history. To that end for any change of plans that require an expenditure of more than \$50, effect a change of appearance, alteration or addition to the external appearance, a permit with inspection is required. This is true in other than the Historic District.

The requirement of a permit and approval is not an unconstitutional requirement. The purpose of the

Architectural and Historic Board of Review is not alone aesthetic but monetary as well. We all know of instances where a neighborhood [9] is ruined by one unrelated project, house or commercial establishment.

The ordinances of Hudson are not facially unconstitutional and since there has been no opportunity to review the permit to alter the plans there is no unconstitutional application of the rules to the defendants at this time.

We do recognize that Section 1204.06 of Chapter 1204 does provide that the Building Inspector shall reject any application that does not conform to the requirements places in his hands an almost regal power. There is of course an appeal provision in Chapter 1224.

On the evidence presented in this case and the comments of the trial court in its finding entered in this case it is almost a foregone conclusion that an application to change the plans and approve the stone aggregate panels would follow in due course.

We have no desire to order from the appellate level the granting of approval of the changed plans, believing that it is better for a rule to be established that would call for a permit, and inspection lest some serious change be approved which could be detrimental to property values and a serious challenge to the Village.

[10] The position of this court is to agree with the attitude of the trial court when it said at the conclusion of its Finding:

"* * *.

"The Court further finds that Hudson by its designated officials has the right to exercise its review powers to their proper end but *must do so in the least restrictive way consistent with equitable consideration to*

minimize the injury that will be caused to Defendants by any revisions it may require of them." (Emphasis ours).

"* * *"

We too feel certain the Architectural and Historic Review Board will notice that a change to make the store more secure, to save energy, and that does not destroy the external appearance any appreciable amount should not be hindered for failure to notify the Village of Hudson of the change in plans.

We have examined all claims of error and find: (1) the trial court did not err in finding that the installation of stone aggregate panels had to be approved by the Architectural and Historic Board of Review of Hudson; (2) the trial court heard the witnesses testify and it is within his province to judge the credibility and weight to be given the testimony submitted. We do not feel it is our privilege to do what the Board of Review should do until they have received the [11] testimony. The trial court did not err in finding the Board of Review should not approve the plans without a hearing; and (3) we do not find the trial court erred in finding the Hudson ordinances are constitutional. We find no error of a prejudicial nature in this case. The judgment is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Summit Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellants.

Exceptions.

/s/ EDWARD J. MAHONEY
Presiding Judge for the Court

[12] MAHONEY, P. J.

VICTOR, J.

HUNSICKER, J.

concur

(HUNSICKER, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, §6(C), Constitution).

APPENDIX C

Findings of the Court of Common Pleas

(Filed February 22, 1982)

Case No. CV 81 3 0687

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

VILLAGE OF HUDSON,

Plaintiff,

vs.

ALBRECHT, INC., *et al.*,

Defendants.

FINDING

Defendants rely strongly as a threshold issue on their belief that the Hudson zoning ordinance does not require an application for a building permit for the window replacement work done. That issue shall therefore be addressed first. Defendants did make application to Hudson for a permit but did not include the window work which was included in their application to the state because, in their opinion, the window work was not being ". . . erected, added to or structurally altered . . ." as specified in Building Permit Requirement Section 1222.03. This interpretation ignores the section following (No. 1222.04 Matter Accompanying Application) which demands submission of ". . . such other information as may be necessary to determine and provide for the enforcement of this Zoning Code." The window information is plainly necessary for its determination and enforcement.

It seems to be undisputed that Hudson has a right to require application for zoning permits. Defendants tacitly admit that because they did apply and submitted their plans for inspection. The difficulty arises from the fact that Hudson zoning ordinance also provides by Chapter 1204 for approval by [2] its Architectural Board of Review. Section 1204.02 defines "Alterations" as "any . . . change in the external architectural features of any . . . building visible from a public way . . ." "Exterior architectural feature" means "the . . . general arrangement of the exterior . . . including . . . windows . . ." These definitions are peculiar to the Architectural Board Chapter of the code and superficially appear to be at variance with Section 1222.03, the permit section, which states that "no building . . . shall be . . . structurally altered until a permit has . . . issued." and Section 1220.04 (49) which defines "'structure alterations' (as) any change in the structural members of a building, such as walls, columns, beams or girders."

These two sections of Hudson's Planning and Zoning Code are obviously addressing two different concerns of the community. The permit sections deal with the safety of persons who will use the building and the Architectural Review section deals with maintaining the quality and character of the community.

Defendants have not persuaded the Court that their argument on this issue has merit.

The issue of constitutionality will be dealt with next.

Hudson's legislative body has the right in its police power to pass ordinances for the public good and welfare and those who object to an ordinance must prove it to be unconstitutional either on its face or as applied to the objecting party, here the Defendants.

The ordinance must also provide for an appeal from the Board's ruling and ultimately to the Court. Both of these due [3] process safeguards are established.

The legislature may not delegate unreasonably or arbitrarily the exercise of its police power to another body, here the Hudson Board of Architectural Review. By its purpose section, Section 1204.01, the legislature erected clear standards looking to the general welfare of the community. The facial constitutionality of the ordinance is apparent from its direct relationship to the public welfare. As applied to the facts of this case, no showing of arbitrary or unreasonable application of Defendants' situation has been shown because the Board did approve the plans which Defendant submitted.

Defendants were proceeding illegally when they removed the windows and replaced them with stone aggregate panels. If no feasible way exists to restore the original appearance, short of taking off the panels and replacing the windows as they formerly were, the Court could order that done as prayed for by Plaintiff. But equity requires consideration of the effect on other parts of the building, particularly the remodelled interior. Restoration of the facade to its former state would obviously entail major and costly remodelling of the interior with concomitant disruption to the operation of Defendant's business. It does not seem to this Court that equity requires such a draconian order at a time when the ingenuity and inventiveness of the architectural profession is so apparent in so many buildings everywhere. Restorations abound where the need to maintain an established outer appearance had to be reconciled with a re-arranged interior which eliminated windows, e.g. the imaginatively restored Akron Art Museum.

[4] It is not revealed in the record of this case what changes if any the Architectural Board would have required if it had had an opportunity to review Defendants' complete plans. The board must be given the opportunity to make that decision but it is not necessary for Defendants to undo its work beforehand.

The Court finds that the Hudson building and zoning ordinance is valid, constitutional and applicable to the work done by Defendants on its windows and facade; that Defendants mistakenly acted illegally in failing to submit their window plans to Hudson and that they have a continuing and presently existing duty to submit them.

The Court further finds that Hudson by its designated officials has the right to exercise its review powers to their proper end but must do so in the least restrictive way consistent with equitable consideration to minimize the injury that will be caused to Defendants by any revisions it may require of them.

Judgment will be rendered accordingly for Plaintiff at Defendants' costs. Counsel may submit an appropriate Journal Entry.

DONALD B. McFADDEN
Judge

APPENDIX D

Judgment of the Court of Common Pleas

(Filed April 20, 1982)

Case No. CV 81-3-0687

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

VILLAGE OF HUDSON

Plaintiff,

vs.

ALBRECHT, INC., et al.,
Defendants.

JUDGMENT ENTRY

This action came on to be tried before the Court, Honorable Donald B. McFadden, presiding, upon the pleadings and the evidence and witnesses presented by the parties having been heard, and briefs of counsel having been received, and the Court has made its findings of fact and conclusions of law, which are incorporated herein.

The Court finds that Chapter 1204, of Title Two, Part Twelve, of the Codified Ordinances of the Village of Hudson, entitled "Architectural and Historic Board of Review", is valid, constitutional and applicable to the work done by Defendants on its windows and facade; that Defendants mistakenly acted illegally in failing to submit their window plans to the Hudson Architectural Board of Review and have a continuing and presently existing duty to submit said plans but it is not necessary for Defendants to undo its work before submission.

The Court further finds that the Village of Hudson by its designated officials, including the Architectural Board of Review, has the right to exercise its review power to their proper end but must do so in the least restrictive way consistent with equitable consideration to minimize the injury that will be caused to Defendants by any revisions it may require of them.

IT IS THEREFORE ADJUDGED, DECREED AND DECLARED that Chapter 1204, of Title Two, Part Twelve, of the Codified Ordinances of the Village of [2] Hudson, entitled "Architectural and Historic Board of Review", is valid, constitutional and applicable to the work done by Defendants on the windows and facade of their building; and that the Village of Hudson has jurisdiction over the issuance of building permits for commercial construction in the Village.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants submit their window plans for Acme Store No. 4 located in Hudson Plaza in accordance with the submission requirements of the Village Ordinances to the appropriate Village of Hudson officials for review within sixty days from the date of this Journal Entry provided it is not necessary for Defendants to remove the illegal structure before such submission.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the designated officials of the Village of Hudson exercise their review powers to the proper end but in a manner that is the least restrictive way consistent with equitable consideration to minimize the injury that will be caused to Defendants by any revisions to the exterior of the building the Village of Hudson officials may require of Defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, in view of this court having ordered that defendants submit the window plans to the appropriate Village officials for approval in accordance with Village ordinances, that:

1. Plaintiff's prayer for relief that Defendants be temporarily and permanently restrained from occupying or using the building known as Acme Store No. 4 in Hudson Plaza, Hudson, Ohio, until the obtaining of the necessary building permit and certificate of occupancy, is hereby denied.
2. Plaintiff's prayer for relief that Defendants be restrained from performing any further construction on said building until the work is brought into compliance with the approved plans is hereby denied.
3. Plaintiff's prayer for relief that defendants be ordered to remove the illegally applied solid substance materials erected on the front of said building is hereby denied.

[3] IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' amended counterclaim be dismissed with prejudice.

Having disposed of all claims raised in the pleadings, the Court, expressly determining that there is no just reason for delay, enters this final judgment entry herein and hereby orders Defendants to pay the costs of this action.

/s/ **McFADDEN**
Judge

APPENDIX E

Judgment Entry of the Supreme Court of Ohio

(Dated January 25, 1984)

No. 83-142

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

VILLAGE OF HUDSON,
Appellee,

vs.

ALBRECHT, INC. *et al.*,
Appellants.

MANDATE

To the Honorable Court of Common Pleas within and
for the County of Summit, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed
without delay to carry the following judgment in this
cause into execution:

Judgment of the Court of Appeals affirmed for the
reasons set forth in the opinion rendered herein.

APPENDIX F

**Notice of Appeal to the Supreme Court
of the United States**

(Filed in the Ohio Supreme Court on April 4, 1984;
Copy Filed in the Summit County Court of
Common Pleas on April 5, 1984)

Case No. 83-142

**IN THE SUPREME COURT
OF THE STATE OF OHIO**

THE VILLAGE OF HUDSON,
Plaintiff-Appellee,

v.

ALBRECHT, INC., et al.,
Defendant-Appellants.

**NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES**

Notice is hereby given that Defendants-Appellants Albrecht, Inc. and Krumroy Construction Company hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on January 25, 1984.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ **JOSEPH M. HOLDEN**

JOHN W. SOLOMON

BROUSE & McDOWELL

500 First National Tower

Akron, OH 44308

(216) 535-5711

Attorneys for Defendants-Appellants

APPENDIX G**Codified Ordinances of Hudson****CHAPTER 1204****Architectural and Historic Board of Review**

1204.01	Purposes.	1204.08	Review procedures in all areas other than Historic Districts and/or historic landmarks.
1204.02	Definitions.		
1204.03	Establishment of Board.		
1204.04	Board membership.		
1204.05	Meetings and rules.	1204.09	Review procedure for the Historic District and historic landmarks.
1204.06	Duties and powers for other than the Historic District and/or historic landmarks.	1204.10	Submission requirements.
1204.07	Duties and powers as to the Historic District and historic landmarks.	1204.11	Advice of consultant.
		1204.12	Appeals.
		1204.13	Interpretation.
		1204.99	Penalty; equitable remedy.

1204.01 PURPOSES.

(a) *Generally.* The Architectural and Historic Board of Review hereinafter created shall serve to protect and preserve the value, appearance and use of property on which buildings are constructed or altered, to maintain a high character of community development, to protect the public health, safety, convenience and welfare and to protect real estate within the Municipality from impairment or destruction of value. Such purposes shall be

accomplished by the Board by regulating, according to accepted and recognized architectural principles, the design, use of materials, finished grade lines, dimensions, orientation and location of all main and accessory buildings to be created, moved, altered, remodeled or repaired, subject to the provisions of the Zoning and Building Codes and other applicable ordinances of the Municipality. In reviewing, regulating and approving building plans, the Board shall consider and take cognizance of the development of adjacent, contiguous and neighboring buildings and properties for the purpose of achieving safe, harmonious and integrated development of related properties.

When requested, the Board shall act in an advisory capacity to any officer, board or commission of the Municipality. In fulfilling any such request, the Board may require drawings, plans, specifications or studies to be submitted according to the provisions of this chapter for its evaluation and recommendation.

(b) *Historic Districts and/or Landmarks.* Council hereby finds and determines that the establishment of restrictions on the construction, erection, alteration, removal, moving or demolition of buildings and structures in areas of historic significance, and on the alteration, removal, moving or demolition of buildings and structures of historic significance, is vital to the preservation of the educational, cultural, economic and general welfare of the Municipality and of its residents. Council further finds and determines, on the basis of its own observations and knowledge and on the basis of the Village of Hudson Architectural and Historical Study, that the following purposes will be served by the establishment of such restrictions by this chapter:

- (1) Promotion of the use and preservation of historic buildings, structures and sites which reflect the

cultural, social, economic, political or architectural heritage of the Municipality for the education and general welfare of the residents of the Municipality;

- (2) Protection and enhancement of the attractiveness of the Municipality as it relates to residents, tourists and visitors, serving as a support and stimulant to business, and thereby strengthening the economy of the Municipality and its residents;
- (3) Stabilization and increase of property values within the Municipality;
- (4) Compatibility of any and all construction of new improvements and buildings and modifications of existing structures with the historic architectural character of the Municipality;
- (5) Enhancement of the visual and aesthetic character, diversity and interests of the Municipality;
- (6) Preservation and further enhancement of civic pride of the residents of the Municipality in the beauty of the Municipality and in the notable accomplishments of the past; and
- (7) Protection of the property rights of owners whose property lies within areas of historic architectural significance.

(Ord. 74-43. Passed 3-3-75.)

1204.02 DEFINITIONS.

As used in this chapter, unless the context clearly requires otherwise:

- (a) "Alteration" means any appreciable change in the external architectural features of any structure or

building, visible from a public way or from adjoining property.

- (b) "Applicant" means any person, association, partnership or corporation or other similar entity who or that applies for a building permit in order to undertake any construction, erection, alteration, removal, moving or demolition.
- (c) "Board" means the Municipality of Hudson Architectural and Historic Board of Review established under the provisions of this chapter.
- (d) "Certificate of Appropriateness" means the official document issued by the Architectural and Historic Board of Review approving and/or concurring in any application for a permit for the construction, erection, alteration, removal, moving or demolition of any structure or building in the Historic District.
- (e) "Council" means the Council of the Municipality.
- (f) "Exterior architectural feature" means the architectural style and general arrangement of the exterior of a structure, including the type and texture of building materials, all windows, doors, lights and signs and other fixtures appurtenant thereto.
- (g) "Historic and/or architectural significance" means that which has a special historic or aesthetic interest or value as part of the development, heritage or cultural character of the Municipality, region, State or Nation.
- (h) "Historic District" means the Hudson Historic District as listed in December, 1973, in the National Register of Historic Places, plus those areas con-

taining any land or buildings having notable character or qualities of historic and/or architectural significance as recommended by the Architectural and Historic Board of Review and approved by Council. The Historic District may include structures or other physical improvements on, above or below the surface of the earth.

The Hudson Historic District, as listed in the National Register of Historic Places, is described as follows:

Beginning at the southeast corner of the lot on the southeast corner of the intersection of College and Streetsboro Streets, thence west along the rear property lines of the lots on the south side of Streetsboro Street to a point approximately 500 feet west of South Main Street, thence north on a line to a point approximately 600 feet north of the midpoint of Owen Brown Street, thence east in a straight line to North Main Street and across the rear property lines of the homes on the north side of Baldwin Street to the midpoint of College Street, thence south to the intersection of the midpoints of College and Aurora Streets, thence northeast along Aurora to the rear property line of the lots on the east side of College Street, thence south along the rear property lines to the point of beginning.

- (i) "Historic landmark" means any individual building or structure determined by the Architectural and Historic Board of Review and approved by Council as historically and/or architecturally significant.

- (j) "Municipality" means the Municipality of Hudson as now or hereafter constituted.
- (k) "Neighboring structure" means any existing structure or any structure for which a building permit has been issued which is situated on any one of the following lots:
 - (1) Any lot within three lots, on the same side of the street on either side of the proposed construction, without regard to intersecting street lines;
 - (2) Any lot within three lots of the property directly across from the proposed construction on the opposite side of the street, without regard to intersecting street lines; or
 - (3) Any lot within two lots of the proposed construction, provided such lot is abutting a street intersecting the street upon which the proposed construction will be located and that the front elevations of the subject structures will be approximately ninety degrees to each other.
- (l) "Owner" means the owner of record, and the term includes the plural as well as the singular.

(Ord. 74-43. Passed 3-3-75.)

1204.03 ESTABLISHMENT OF BOARD.

There is hereby established an Architectural and Historic Board of Review, hereinafter and hereinbefore referred to as the Board, with the powers and duties as hereinafter set forth. (Ord. 74-43. Passed 3-3-75.)

1204.04 BOARD MEMBERSHIP.

The Board shall consist of nine members appointed by Council. Each member shall have been a resident of the Municipality for the two years next preceding his appointment, except that each member who is a registered architect need only have been a resident of the Municipality for the six months next preceding his appointment. Such members shall hold no other public office in the Municipality. Members shall be appointed for three-year terms to serve without compensation. Members may succeed themselves.

Of the nine members, Council shall designate three who shall constitute a subcommittee whose concern shall be the Historic District and/or historic landmarks.

Terms of members appointed under former Chapter 1204 of these Codified Ordinances (Ordinances 69-14 and 73-37) shall expire upon the effective date of this chapter (Ordinance 74-43, passed March 3, 1975). Of the new nine members then appointed, one subcommittee member and two other members shall be appointed for one-year terms, one sub-committee member and two other members shall be appointed for two-year terms, and one subcommittee member and two other members shall be appointed for three-year terms. Thereafter, all members shall be appointed for three-year terms.

(Ord. 74-43. Passed 3-3-75.)

1204.05 MEETINGS AND RULES.

The Architectural and Historic Board of Review shall meet on the first Monday in January of each year that is not a legal holiday and shall elect one of its members as Chairman, a second member as Vice-Chairman and a third member as Secretary. The Board shall hold such meet-

ings, not less than one in any calendar month, as it may determine. The elected Chairman, and in his absence the Vice-Chairman, shall be responsible for the proper administration of the Board's work and the elected Secretary shall keep, or cause to be kept, in the Village Offices, a complete and accurate record of all meetings and proceedings of the Board.

All meetings of the Board shall be open to the public and five members thereof shall constitute a quorum. A majority vote of the members present shall be required to take action. In order to better carry out the provisions of this chapter, the Board by formal motion shall adopt rules for the conduct of its business. In addition, the Board shall adopt uniform architectural criteria to be applied to all matters submitted to it. However, such criteria must be reviewed and approved by a panel of three registered architects not serving on the Board. At least one of these shall be a qualified restoration architect as defined in "The Architect as Preservationist," Bulletin No. 21 of the AIA Architects' Handbook of Professional Practice, a copy of which is on file in the Clerk of Council's office. The third member of the panel shall be selected by the other two.

(Ord. 74-43. Passed 3-3-75.)

1204.06 DUTIES AND POWERS FOR OTHER THAN THE HISTORIC DISTRICT AND/OR HISTORIC LANDMARKS.

When the Historic District and/or historic landmarks are not involved, the Architectural and Historic Board of Review shall have the following duties and powers.

The Building Inspector shall review all documents submitted for a building permit and the applicant shall

satisfy the Inspector that the documents comply with the requirements hereinafter defined and with all other ordinances of the Municipality that have application to the issuance of building permits. The Building Inspector shall reject any application that does not conform to these requirements. If the application is acceptable to the Building Inspector, the Board shall review such application at a public meeting within twenty-one days of its receipt by the Chairman. Where field inspections or detailed reviews are necessary, an application may be tabled for up to twenty-one days; where other unusual circumstances dictate, additional time may be taken by the Board upon notice to the applicant. Within seven days subsequent to its decision, the Board shall report in writing to the Building Inspector its actions together with the reasons therefor. Such actions shall consist of an "approval," "disapproval" or "conditional approval" based on stipulated revisions. If the Board is notified by the property owner in writing within thirty days of objections to the stipulated revisions of a conditional approval, the Board shall again review the application and issue either an unqualified "approval" or "disapproval" within thirty days from the receipt of such letter by the Chairman. The Building Inspector shall then date and stamp the application as "approved" or "disapproved," advising the applicant in writing, in the latter case, of the reasons for such disapproval.

(Ord. 74-43. Passed 3-3-75.)

1204.07 DUTIES AND POWERS AS TO THE HISTORIC DISTRICT AND HISTORIC LANDMARKS.

When Historic Districts and/or landmarks are involved, the Architectural and Historic Board of Review,

through its subcommittee, shall have the following duties and powers:

- (a) To recommend to Council the geographic boundaries of additions to or changes in the Historic District, and to recommend those buildings and structures which should be designated historic landmarks. Such District and landmarks shall be defined by the Board in light of the following considerations to be fully discussed in a report to be submitted to Council with the Board's recommendations: (The following analyses may be actually made by the Board, or they may be made by others subject to acceptance and endorsement by the Board.)
- (1) An analysis of existing structures by period of construction, special historic importance, architectural style, condition, present use, assessed valuation and other matters relating to planning or regulating future development, such as location on lots, location of yards and other open spaces, access to interior of the block, and off-street parking. This analysis shall include an identification of individual structures and premises of substantial public interest, with maps, photographs and other data indicating the particular features desired to be preserved. The analysis shall also include an identification of existing structures, premises and uses likely to have an adverse effect on the desired character of the District, including those in and those near and visually related to the District, with maps, photographs and other data indicating the reasons for such classification.

- (2) An analysis of lands not occupied by structures, including lands in and lands near and visually related to the District. The boundaries of such District shall include both sides of streets and shall divide the District from the other portion of the Municipality at rear lot lines where possible. The boundaries of such District and the list of historic landmarks shall be presented to Council for approval. Upon approval by Council, the boundaries of any such District and any such historic landmarks shall be clearly designated on the official Zoning Map of the Municipality on file in the office of the Clerk of Council.
- (b) To issue Certificates of Appropriateness prior to the issuance of any building permit or other permit pertaining to the construction, erection, alteration, removal, moving or demolition of any structure in the Historic District, or the alteration, removal, moving or demolition of any historic landmark;
- (c) To advise the Municipal Planning Commission, Council, the Building Inspector, other public agencies and property owners in matters involving structures and areas of historic and/or architectural significance, and, further, to assemble and make available information pertaining to funds, from both public and private sources, available for restoration, alteration and preservation;
- (d) To propose from time to time to the Municipal Planning Commission and Council the establishment or disestablishment of structures and/or areas for historic preservation under the provisions of this chapter; and

- (e) To make recommendations concerning the establishment of an appropriate system of markers for historic structures and areas, to advise owners or residents of historically and/or architecturally significant structures or areas on problems and techniques, and resources for, historic preservations, to make recommendations, concerning the preparation of maps, brochures and descriptive material about the Municipality's structures and areas of historic and/or architectural significance, and promote the public interest in the foregoing purposes by carrying on a public relations program.

(Ord. 74-43. Passed 3-3-75.)

1204.08 REVIEW PROCEDURE IN ALL AREAS OTHER THAN HISTORIC DISTRICTS AND/OR HISTORIC LANDMARKS.

- (a) No residential, commercial or industrial building permit shall be issued unless the applicant establishes for the Architectural and Historic Board of Review that:
 - (1) The applicant has complied with Sections 1204.06 and 1204.10 and the proposed structure is in compliance with subsection (b) hereof;
 - (2) The exterior architectural character and functional plan of the proposed structure, when erected, will not be at such variance with existing structures, or structures currently being built, in the immediate neighborhood or zoning district as to cause substantial depreciation in the property values of such existing structures or structures currently being built;

- (3) The site utilization and orientation of the proposed structure is reasonably integrated with existing roads, drives, vehicular traffic patterns and pedestrian walkways abutting the property upon which the proposed structure is to be built; and
- (4) The proposed structure does not violate the "look-alike" provisions of subsection (b) hereof.

(b) No building permit shall be issued in a Residence District for an application to erect, construct, alter or remodel any building or structure which shall be like or substantially like any neighboring structure, hereinbefore defined, then in existence or for which a building permit has been issued. The Board shall approve such application unless the applicant fails to establish that no more than two of the following exist with respect to any such neighboring structure:

- (1) The roof style of the proposed structure is similar to the structure it resembles;
- (2) The roof pitch of the proposed structure is less than three vertical units in twelve from the structure it resembles;
- (3) More than half of the exterior surface materials of the proposed structure are the same as the structure it resembles;
- (4) The relative location of an attached garage, porch, portico, breezeway, gable or other major design feature attached to the proposed structure is similar to the structure it resembles; or
- (5) The relative location of entry doors, windows, shutters or chimneys in the proposed construction is similar to the structure it resembles.

(Ord. 74-73. Passed 3-3-75.)

1204.09 REVIEW PROCEDURE FOR THE HISTORIC DISTRICT AND HISTORIC LANDMARKS.

(a) No building permit for the construction, erection, alteration, removal, moving or demolition of any structure or building in the Historic District, or for the alteration, removal, moving or demolition of any historic landmark, shall be issued where such action will affect the exterior architectural features of any such structure or building, unless and until a Certificate of Appropriateness has been issued by the Architectural and Historic Board of Review. Upon application for a building permit with respect to any structure or building in the above categories, the Building Inspector shall submit such application, together with the related plans and specifications, within five days of receipt thereof, to the Board for its consideration.

(b) Upon receipt by the Board of the building permit application and related materials for any such proposed construction, erection, alteration, removal, moving or demolition, the Board shall, if approved, submit within thirty days a Certificate of Appropriateness to the Building Inspector to authorize issuance of a permit for the requested construction, erection, alteration, removal, moving or demolition.

(c) If not approved, the Board shall give notice of a public hearing to be held within forty-five days to consider such application. Such notice shall be published once a week for two consecutive weeks in a newspaper having general circulation within the Municipality, and shall be first published not less than ten days prior to such hearing. The applicant shall be advised of the time and place of such hearing by notice mailed certified mail addressed to him at the address set forth in such application, such notice to be mailed not less than five days

prior to such hearing. The Board may invite such other persons or groups as it desires to attend the meeting. The Board shall meet and act with all reasonable dispatch.

(d) In determining whether or not a Certificate of Appropriateness shall be issued, the Board shall consider whether the proposed change will affect adversely or destroy any significant historic or architectural feature of the structure, whether it is inappropriate or inconsistent with the spirit and purpose of this chapter and whether it will affect adversely or destroy the general historic and architectural significance of the district. The Board shall also examine any other considerations specifically listed and adopted by Council. With respect to any proposed demolition, the Board shall determine whether or not preservation is economically feasible for the applicant, and shall issue a Certificate of Appropriateness if the denial of such Certificate would result in practical difficulty or unnecessary hardship that would deprive the applicant of the reasonable use of the land or building involved. If the Board recommends that the Certificate of Appropriateness not be issued, it will advise the applicant of any changes which would secure the approval of the Board and will withhold denial of the Certificate of Appropriateness for a period not to exceed thirty days in order that the applicant may adopt such proposed changes.

(e) After the hearing provided for above, and after the subsequent alterations, if any, in the plans and/or specifications as provided, the Board shall submit, in writing, its recommendations to the Building Inspector, and if then approved, issue the Certificate of Appropriateness to authorize a permit for the construction, erection, alteration, removal, moving or demolition. The written report shall include the location of the proposed work, the exterior changes contemplated, the findings of the

Board and the recommendations of the Board as to the grant or refusal of the Certificate of Appropriateness. The Board shall make its report within ninety days after submission of the application to it; otherwise the application for the permit shall be deemed to have been approved and the favorable Certificate of Appropriateness shall be issued by the Board, provided, however, that the applicant may waive this requirement and consent to an extension of such period.

(f) Denial by the Board of a Certificate of Appropriateness may be appealed by the applicant to the Board of Zoning and Building Appeals in accordance with Section 1204.12.

(Ord. 74-43. Passed 3-3-75.)

1204.10 SUBMISSION REQUIREMENTS.

Every building permit application for a structure to be built or remodeled in the Municipality shall be approved by the Building Inspector in the Department of Service of the Municipality and the Architectural and Historic Board of Review. In order for the above-mentioned application to be so approved, the applicant shall submit to the Building Inspector two complete sets of drawings and supplemental specifications, prepared in accordance with good architectural practice, indicating the building or structure exactly as it is proposed to be built. Such documents, accurately drawn to scale and dimensioned, shall include and conform to the following requirements:

(a) A site plan or plot plan showing the plot configuration and its perimeter dimensions, all structures on the site with locating dimensions, location of all structures adjacent to the site within fifty feet

of the property line, and all vehicular drives, roads, related parking areas, main walks, walls, fences and major existing landscaping. In addition, locations and names of adjacent streets, a north arrow, first floor level, existing and finished grade elevations at each corner of new constructions and at each corner of the site shall be indicated.

- (b) Four elevations, including a front, rear and two side elevations, together with additional views or cross-sections, if necessary, to completely indicate the exterior appearance of the structures. All elevations shall be drawn to the same scale, which shall be not less than one-quarter of an inch to the foot, except that the front elevation may be drawn to a larger scale. Each elevation shall show the accurate location of windows, doors, shutters, chimneys, porches and other architectural features, all materials and finishes, and an accurate finish grade line.
- (c) A completely dimensioned floor plan of each level of the construction, drawn to the same scale as the front elevation;
- (d) Additional details to show unusual construction;
- (e) Color samples of all major finish materials; and
- (f) For new construction, drawings or photographs of existing structures that are to remain on the site, and of structures which are situated on any of the lots described in Section 1204.02(k); and for additions to existing structures, drawings or photographs of all elevations from which the addition can be seen.

(Ord. 74-43. Passed 3-3-75.)

1204.11 ADVICE OF CONSULTANT.

When requested by official action of the Architectural and Historic Board of Review, the Village Manager is hereby authorized and directed to employ a qualified, licensed architect to consult with and assist the Board on any and all matters set forth in this chapter. If the Historic District and/or historic landmarks are involved, such architect shall be a qualified restoration architect as identified in Section 1204.05. Such consultation and assistance shall be strictly advisory and the Board will not be bound by the architect's recommendations or opinion, except for such approvals as provided in Section 1204.05.

(Ord. 74-43. Passed 3-3-75.)

1204.12 APPEALS.

An appeal to the Board of Zoning and Building Appeals may be taken by any person aggrieved, or by any officer of the Municipality affected, by any decision of the Architectural and Historic Board of Review. Such appeal shall be taken within twenty days after the decision has been filed with the Building Inspector, by filing with the Inspector and with the Board of Zoning and Building Appeals, a notice of appeal specifying the grounds therefor. The Building Inspector shall forthwith transmit to the Board of Zoning and Building Appeals all papers constituting the record upon which the action appealed was taken. The authority, duties and proceedings of the Board of Zoning and Building Appeals shall be such as are prescribed in the Zoning Code.

(Ord. 74-43. Passed 3-3-75.)

1204.13 INTERPRETATION.

Unless otherwise specifically stated herein, it is not intended that this chapter repeal, abrogate, annul or in

any way impair or interfere with any existing provision of law or ordinance or any rule or regulation previously adopted or issued or which shall be adopted or issued pursuant to the law relating to the use of buildings or premises, provided, however, that where this chapter imposes a greater restriction upon the use of buildings or premises than is imposed or required by such regulations, this chapter shall control. This chapter is to be construed liberally to secure the beneficial interests and purposes thereof. (Ord. 74-43. Passed 3-3-75.)

1204.99 PENALTY; EQUITABLE REMEDY.

Whoever violates or fails to comply with any of the provisions of this chapter shall be fined not less than ten dollars (\$10.00) nor more than five hundred dollars (\$500.00) for each offense. A separate offense shall be deemed committed each day during or on which a violation or noncompliance occurs or continues. Notwithstanding the foregoing penalty provision, the Municipality shall have the authority to institute appropriate proceedings to prevent the continued violation of this chapter.

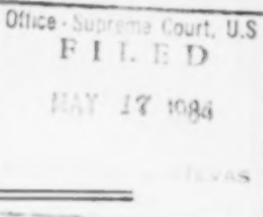
(Ord. 74-43. Passed 3-3-75.)

* * * * *

1428.01 PERMIT REQUIRED.

No person shall construct or alter any building or structure in the Municipality, except fences, when the cost of the same exceeds fifty dollars (\$50.00) or where the effect of such construction or alteration is to enlarge the capacity or affect the bearing walls of any building or the roof thereof, without having first secured a permit therefor.

(Ord. 57-87. Passed 10-1-57.)



No. 83-1711

In the Supreme Court of the United States

October Term, 1983

ALBRECHT, INC., *et al.*,

Appellants,

VS.

VILLAGE OF HUDSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Whether municipal ordinances that require owners of commercial property to secure approval of an architectural review board, as part of a building permit review process, prior to making any external architectural alterations is within the police power of the state and, therefore, not facially violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution when such ordinances provide adequate review and appeal procedures.

Whether it is within the police power of the states for a municipal legislative body to take aesthetics into consideration as one of the factors in enacting zoning legislation.

TABLE OF CONTENTS

Questions Presented	1
Motion to Dismiss or Affirm	1
Statement of Facts	1
This Appeal Should Be Dismissed As There Is No Substantial Federal Question Presented	3
The Judgment of the Ohio Supreme Court Should Be Affirmed	6
Conclusion	8

TABLE OF AUTHORITIES**Cases**

<i>Berman v. Parker</i> , 348 U.S. 26 (1954)	4
<i>Euclid v. Ambler Realty Co.</i> , 272 U.S. 365 (1926)	4, 5
<i>Gorieb v. Fox</i> , 274 U.S. 603 (1927)	4
<i>Metro Media, Inc. v. San Diego</i> , 453 U.S. 490 (1981) ...	4
<i>Penn Central Transportation Co. v. New York City</i> , 438 U.S. 104 (1978)	4
<i>State v. Jones</i> , 305 N.C. 520, 290 S.E.2d 675 (1982) ...	4

Constitution and Ordinance

United States Constitution, Fourteenth Amendment ...	1
Codified Ordinances of the Village of Hudson:	
Chapter 1204	1, 3
Section 1204.08	6

No. 83-1711

In the Supreme Court of the United States

October Term, 1983

ALBRECHT, INC., *et al.*,
Appellants,

VS.

VILLAGE OF HUDSON,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

MOTION TO DISMISS OR AFFIRM

Appellee respectfully moves this Court to dismiss the within appeal on the basis that there is no substantial federal question presented or, in the alternative, to affirm the judgment of the Ohio Supreme Court as a proper statement of the law with respect to the questions presented, on the basis of the brief submitted with respect to each motion.

STATEMENT OF FACTS

Appellee, Village of Hudson, is the owner of certain property acquired under an issue of industrial revenue bonds which is leased to appellant, Albrecht, Inc. ("Albrecht"), and upon which a shopping center, including Acme Store No. 4, is located.

Under Chapter 1204 of the ordinances of the Village of Hudson and as part of a building permit review process,

detailed building plans for new construction, alterations or additions to buildings are submitted to the Architectural and Historic Board of Review.

Appellant submitted to the Village a detailed set of plans in connection with the expansion, alteration and addition of the Acme Store No. 4, which plans detailed the work to be carried out on the east, south and west sides of the building. The submitted plans did not indicate that appellant intended any construction, alteration or addition on the north side of the store which is the street frontage of the building.

The plans relating to the east, south and west sides of the building were approved by the Building Inspector and the Architectural and Historic Board of Review in 1978.

Construction did not commence until late 1980 and early 1981 when appellant, during the course of construction, altered the facade of the north side of the building replacing certain windows with aggregate stone panels. Work continued on the north facade despite a stop work order issued by the Building Inspector and the Village of Hudson instituted an action in the Court of Common Pleas of Summit County, Ohio, requesting that the court enjoin the appellant from performing any further construction on Acme Store No. 4. Appellant filed a counterclaim requesting the court to determine and declare that the Hudson ordinances were unconstitutional.

As part of its defense, appellant relied on plans submitted to the State of Ohio Department of Industrial Relations, Division of Factory and Building Inspection, for the issuance of a State permit, which plans did portray certain work to be done on the north facade of the building.

Appellant, up to the present date, has never submitted any plan to the Village of Hudson for review for the work which was performed on the north facade of the store.

As noted in appellant's Jurisdictional Statement, the Court of Common Pleas, the Ohio Court of Appeals for the Ninth Judicial District, and the Supreme Court of Ohio each held that Chapter 1204 of the Codified Ordinances of the Village of Hudson was a valid exercise of the state's police power and, therefore, was not violative of the United States Constitution.

THIS APPEAL SHOULD BE DISMISSED AS THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED.

The appellant herein submitted the plans for the east, west and south facades to the Architectural and Historic Board of Review and did receive approval for such construction from the Architectural Board. Since the plans for the alterations of the north facade were never submitted to the Architectural Board, there has been no unconstitutional application of the ordinances imposed upon the appellant. Accordingly, any discussion of unconstitutionality is necessarily restricted to facial unconstitutionality of the ordinance.

Appellant complains, on page 14 of its Jurisdictional Statement, that the stated purpose of protecting real estate from impairment and destruction of value does not serve to move the ordinances at issue out of the realm of aesthetic regulation.

This Court has on many occasions recognized that the relationship between aesthetics and the public welfare is

such that the promotion of aesthetic values is a legitimate police power purpose. See, *Metro Media, Inc. v. San Diego*, 453 U.S. 490 (1981); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Berman v. Parker*, 348 U.S. 26 (1954); and *Gorieb v. Fox*, 274 U.S. 603 (1927).

The holding of the Ohio Supreme Court in this case merely reaffirms the proposition that the inclusion of aesthetics as one of the factors considered in the enactment of zoning legislation does not violate any United States constitutional provision.

While the appellant herein contends that this case represents Ohio's shift to the view that a state's police power does include the power to regulate land use based solely upon aesthetics, the reference to aesthetics herein was not considered by the Ohio Supreme Court as being determinative of the present zoning legislation.

In point of fact, the Ohio Supreme Court stated specifically that:

"Moreover, we find further that the ordinance does not rest solely upon aesthetic considerations. Rather, Section 1204.01 also reflects a concern for the monetary interests of protecting real estate from impairment and destruction of value. We believe that these goals are includable under the general welfare aspect of the municipal police power and may therefore justify its reasonable exercise." (9 Ohio St. 3d 73.) (Emphasis supplied.)

Many state courts have come to the conclusion that the promotion of aesthetics is a valid police purpose. *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982). The history of zoning itself indicates that zoning law is basically nothing more than an articulation of community taste. The limitations on this articulation were set forth in *Euclid v. Ambler*

Realty Co., 272 U.S. 365 (1926), where this Court stated at page 388, that:

"The question whether the power exists to forbid the erection of a building of a particular kind or for a particular use like the question of whether a particular thing is a nuisance is to be determined not by an abstract consideration of the building or the thing considered a part but by considering it in connection with the circumstances and locality . . . a nuisance may merely be a right thing in the wrong place, like a pig in the parlor instead of the barnyard."

However, as in the *Euclid* case, the community must have the right to first make the determination and decision through its designated body as to whether or not their proposal comports with the standards or guidelines of the legislation. Without such initial review, there can be no determination of the particular proposal in connection with the circumstances and locality.

Due process requires some reasonable means of relief to prevent an arbitrary, capricious or unreasonable determination. In the present case, an appellate procedure is provided to the Village Zoning Board of Appeals and thence to the courts of the State to guard against arbitrary, discriminatory or unreasonable action which would constitute an abuse of discretion on the part of the body issuing the ruling.

The Ohio Supreme Court has also addressed the question of meaningful guidelines and found that the board is required to act in accordance with accepted and recognized architectural principles as well as other provisions of the Zoning Code and ordinances of the village. The standards to be followed which take into account the proposed structure's harmonious development with existing

buildings, as well as its reasonable integration with vehicular and pedestrian traffic patterns, are set forth in Section 1204.08 of the Code.

The ordinance herein, as noted by the Ohio Supreme Court, is entitled to a presumption of validity. Appellant raises no valid objection to the legislation on its face and presents no evidence of ill motive, arbitrariness or capriciousness in the adoption of this particular ordinance.

Accordingly, it is respectfully submitted that the within appeal presents no substantial federal question and, therefore, should be dismissed.

THE JUDGMENT OF THE OHIO SUPREME COURT SHOULD BE AFFIRMED.

The appellant proposes to present to this Court the facial validity of the municipal ordinance with a claimed lack of guidelines or standards in the legislation, which issues were squarely addressed and properly resolved by the Ohio Supreme Court. The Court found and stated at 9 Ohio St. 3d, page 74, that:

"In the present case, Section 1204.01 of the ordinance declares the broad policies to be advanced—the protection and preservation of the value, appearance and use of property; the maintenance of a high character of community development; and the protection of real estate from impairment or destruction of value. In order to accomplish this policy, the board is given authority to regulate various aspects of all structures to be built or modified. In exercising its authority, the board is to be guided by 'accepted and recognized architectural principles,' as well as other provisions of the zoning code and ordinances of the village. In particular, Section 1204.08 of the code lists other stan-

dards to be followed which take into account the proposed structure's harmonious development with existing buildings, as well as its reasonable integration with vehicular and pedestrian traffic patterns.

It is our view that these sections set forth all the standards reasonably necessary to guide the board in the exercise of its discretion and that, therefore, the ordinance does not constitute an unlawful delegation of legislative authority."

The question concerning the relationship of aesthetics to zoning regulations has been addressed and fully answered in the Motion to Dismiss herein. Additionally, the Ohio Supreme Court found and stated at 9 Ohio St. 3d 69, at page 73, that:

"Moreover, we further find that the ordinance does not rest solely upon aesthetic considerations. Rather, Section 1204.01 also reflects a concern for the monetary interests of protecting real estate from impairment and destruction of value. We believe that these goals are includable under the general welfare aspect of the municipal police power and may therefore justify its reasonable exercise.

Based upon the foregoing analysis, we must reject appellants' contention that the village zoning ordinance is not substantially related to the public health, safety and general welfare and is thus an invalid exercise of the local police power."

The sound reasoning of the Ohio State Supreme Court in holding that the ordinances of the Village of Hudson are valid and its decision in permitting aesthetics to be considered as one of the factors in enacting zoning legislation has a sound basis in reason as well as law. This Court should affirm the ruling of the Ohio Supreme Court.

CONCLUSION

Probable jurisdiction should be denied and the within appeal dismissed by this Court. In the alternative, this Court should affirm the judgment of the Ohio Supreme Court as being a proper articulation of the law with respect to the legitimacy of architectural boards of review.

Respectfully submitted,

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